



1 “qualified individual” is a person with a disability who “with or without reasonable  
2 accommodation, can perform the essential functions of the employment position that such  
3 individual holds or desires.” Id. ¶ 12111(8). “Essential functions” are defined as “the  
4 fundamental job duties of the employment position . . . not includ[ing] the marginal functions  
5 of the position.” 29 C.F.R. § 1630.2(n)(1).

6 Beginning in 1998, Gribben was employed by UPS as a shifter driver, responsible for  
7 transferring trailers within UPS’s distribution center. Shifter drivers can drive two kinds of  
8 vehicles—a “shifter,” which has an air or hydraulic-operated fifth wheel that automatically  
9 raises and lowers trailers, or a “brown,” which requires a driver to manually perform the task.  
10 In June 2002, Dr. Karl Moon diagnosed Gribben as having congestive heart failure and  
11 cardiomyopathy. Dr. Moon determined that Gribben’s physical impairment prevented him  
12 from working in temperatures greater than 90 degrees Fahrenheit for continuous periods of  
13 time in excess of 20 minutes unless he was afforded the opportunity to cool down.

#### 14 **I. Qualified Individual**

15 UPS now argues that, even assuming Gribben has a “disability” as defined by the  
16 ADA, his discrimination claim must fail because he cannot perform the essential functions  
17 of his job, with or without reasonable accommodation, and therefore he is not a “qualified  
18 individual” as defined by the ADA. The essential job functions of a shifter driver include  
19 the ability to (1) work in an environment with variable temperatures and humidity, and (2)  
20 tolerate exposure to outside inclement weather. DSOF, exhibit 6. UPS argues that because  
21 Gribben’s job requires him to work outside, his medical restrictions prevent him from  
22 performing the essential functions of his job. However, according to Dr. Moon’s assessment,  
23 Gribben is not prevented from working outside. He can tolerate heat, but not for continuous  
24 periods in excess of 20 minutes. Gribben argues that if he is allowed to use an air  
25 conditioned vehicle, he is able to perform the essential functions of his job.

26 UPS contends that even if Gribben were guaranteed the use of an air conditioned  
27 vehicle, Dr. Moon’s restrictions would not be satisfied because the temperature inside the air  
28 conditioned cab remains in excess of 90 degrees. UPS relies on the report of industrial

analyst, Dr. Peter Vasquez, who, based on his observations on July 31, 2002, concluded that the temperature inside the tested air conditioned vehicle did not drop below 90 degrees until after 11:00 p.m. DSOF, exhibit 5.

Gribben refutes this evidence with a declaration by co-worker, Randy Pedefferri, that on July 31, 2002, UPS asked him to test the temperature inside his vehicle. Pedefferri attested that not only was his vehicle's air conditioning not functioning properly, but, as was his customary practice, he drove with his window completely rolled down throughout the day. Pedefferri Depo. ¶ 4. According to Gribben, both of these factors caused the temperatures readings inside the vehicle to register significantly higher than usual. This is an issue of fact for trial.

UPS also argues that Gribben's requested accommodation of an air conditioned vehicle would be futile because a shifter driver is required to work outside the air conditioned vehicle for a significant portion of the day.<sup>1</sup> An issue of fact exists as to how much time a shifter driver is required to work outside his vehicle. While UPS asserts that shifter drivers spend less than half their time inside the vehicle, DSOF, ¶ 14, Gribben presents evidence that shifter drivers spend as little as 15% of the day outside their vehicles. Second PSOF, exhibit A at 16.

Because issues of fact exist as to whether Gribben's requested accommodation would enable him to perform the essential functions of his job, thereby rendering him a "qualified individual" under the ADA, we deny UPS's motion for summary judgment on this basis.

## II. Reasonable Accommodation

UPS also argues that Gribben is not entitled to ADA protection because his requested accommodations are unreasonable. It claims that Gribben's physician ordered two work restrictions: (1) permanent assignment to an air conditioned truck, and (2) 5 to 10 minute

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<sup>1</sup>Although UPS characterizes Dr. Vasquez's report as providing that, as a shifter driver, Gribben is required to work outdoors in excessive heat "for periods longer than 20 minutes," Motion at 3, DSOF ¶ 10, Dr. Vasquez's report provides only that shifter drivers "spent less than 1/2 of their time inside the cab of the vehicle." DSOF, exhibit 5.

1 breaks for every 20 minutes spent in the heat. UPS contends that because these  
2 accommodations would require it to eliminate one or more essential functions of Gribben's  
3 position and substantially modify its operation, neither accommodation is reasonable as a  
4 matter of law.

5 Under the ADA, "reasonable accommodations" are "[m]odifications or adjustments  
6 to the work environment, or to the manner or circumstances under which the position held  
7 or desired is customarily performed, that enable a qualified individual with a disability to  
8 perform the essential functions of that position.' " 29 C.F.R. § 1630.2(o)(1)(ii). UPS asserts  
9 that it assigns vehicles to its shifter drivers based on business needs and equipment  
10 availability, and that it cannot guarantee Gribben an air conditioned truck every day. DSOF  
11 ¶¶ 17-19. It claims that in order to guarantee Gribben an air conditioned truck, it would have  
12 to change its fundamental business practices, presumably causing an undue hardship. See  
13 29 C.F.R. § 1630.2(p).

14 Gribben, on the other hand, contends that his request for accommodation does not  
15 require UPS to alter its business practice. First, he argues that UPS has written policies and  
16 procedures which provide that whenever possible it will assign the same equipment to the  
17 same employee. PSOF, Add'l SOF ¶ 9; Second PSOF ¶ 25; see also Bartholomew Depo.,  
18 Second PSOF, exhibit B at 86 (testifying that UPS assigns the same equipment to each  
19 employee every day wherever possible). Moreover, Gribben claims that UPS has  
20 periodically assigned him an air conditioned vehicle for lengthy periods of time without  
21 issue. For example, from June 2003 through March 31, 2004, and again from August to  
22 September 2005, UPS provided Gribben with an air conditioned vehicle. PSOF, Add'l SOF  
23 ¶ 15; Second PSOF ¶ 24. At a minimum, an issue of fact exists as to whether assigning  
24 Gribben an air conditioned vehicle would constitute a change in UPS's fundamental business  
25 practices so as to make the requested accommodation unreasonable.

26 Finally, UPS asserts that Dr. Moon required that Gribben receive a 5 to 10 minute  
27 break for every 20 minutes that he spends in the heat, and that the production standards for  
28 its shifter drivers do not allow for such breaks. It claims that this accommodation would

1 reduce the number of shifts that Gribben could perform, forcing UPS to hire a “helper” in  
2 order to keep pace with the influx of trailers needing to be shifted. Motion at 9. It claims the  
3 law is clear that an employer is not required to hire a helper or transfer an employee’s duties  
4 to his co-workers as a reasonable accommodation.

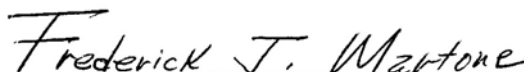
5 Gribben responds that he has never requested an accommodation in the nature of a  
6 break every 20 minutes, and that UPS’s argument mischaracterizes Dr. Moon’s testimony.  
7 Dr. Moon testified that Gribben should not be exposed to heat in excess of 90 degrees for  
8 more than 20 minutes at a time. Moon Depo. at 41. In response to a question by UPS’s  
9 lawyer, Dr. Moon stated that it would take approximately 5 to 10 minutes in air conditioning  
10 for Gribben to recover from the heat exposure. Id. at 42. UPS now argues that Dr. Moon’s  
11 restrictions include both an air conditioned truck and a 5 to 10 minute break every 20  
12 minutes. We do not read the testimony that way. Rather, Dr. Moon required Gribben to  
13 avoid prolonged exposure to temperatures in excess of 90 degrees. Gribben seeks to satisfy  
14 this restriction by driving an air conditioned vehicle—not by taking a break every 20  
15 minutes. An issue of fact remains as to whether driving an air conditioned vehicle will  
16 effectively accommodate Gribben’s medical condition.

### 17 **III. Conclusion**

18 Based on the foregoing, we conclude that issues of fact exist as to whether Gribben  
19 is a “qualified individual” under the ADA and whether the accommodation requested by  
20 Gribben is reasonable.

21 **IT IS ORDERED DENYING** UPS’s second motion for summary judgment (doc.  
22 171).

23 DATED this 12<sup>th</sup> day of March, 2009.

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28 Frederick J. Martone  
United States District Judge